

Part III

Protection of Established Position and Normative Development

*Protection of Established Position,
Normative Incoherence and the
Changing Normative Field
of Labour Law*

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I. INTRODUCTION

ANNA CHRISTENSEN DEVELOPED her theory on law as normative patterns in a normative field in a period when the European and European Union influence on the national legal system was becoming evident. She discussed the social dimension extensively and was, in fact, the driving force behind the establishment of a subject to become known as ‘the Social Dimension’ at the Faculty of Law at Lund University. In this subject, she and her colleagues dealt with family law, labour law, housing law and social security law. Legal regulation in these fields shares the common feature of regulating the everyday life of ordinary people and is deeply rooted in the normative culture of a particular society.¹

Christensen was interested in the normative structures’ process of development, and she saw this development as taking place in a normative field containing various poles, such as the Market-Functional pattern (the right to ownership and freedom of contract), the Protection of Established Position and the third pole of Just Distribution. Christensen described these different patterns as ‘magnetic poles seeking to attract the legal rules’, and argued that legal change and development can be described as movements within the normative field.²

One of the normative fields studied by Christensen was the one constituted by working life and labour law. In my chapter of this anthology, I intend to apply

¹ See A Christensen, ‘Protection of the Established Position: a Basic Normative Pattern’ (1998) 42 *Scandinavian Studies of Law* 286.

² See A Christensen ‘Normative Patterns and the Normative Field: a Post-Liberal View on Law’ in T Wilhelmsson and S Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot, Ashgate, 1999).

Christensen's theory in analysing the normative development of labour law in the new millennium. This is a period that is not examined by Christensen herself, since she passed away in 2001. I will attempt to reflect on this development from the point of view of Christensen's theoretical starting points, and especially, as indicated by my title, the protection of established position.

As my starting point, I wish to emphasise that Christensen stressed that there are always conflicts between the different normative patterns within a normative field. These patterns do not make up a system, they cannot be ordered in a hierarchy, and there are no principles of superior dignity determining which pattern dominates or gets the upper hand.³ This fact already shows that the theory does not address the normative content and interpretations of individual norms, but rather how the normative content can be placed in the normative field, and how legal changes and developments can be understood as movements within the normative field.

In order to analyse how these changes can be positioned within the normative field of labour law, I will deal with three strong developmental features in European and EU labour law. These are:

- (1) the tension between the EU economic freedoms and fundamental labour rights (the right to collective action) after the *Viking* and *Laval* judgments;
- (2) the dominating general developments in European and EU labour law, as I see them;
- (3) the latest developments in the economic constitution of the European Union after the economic and financial crisis.

I will try to evaluate these developments in light of Christensen's theory, and will also reflect on the limits and prospects for applying the theory to these legal changes within labour law.

II. TENSION BETWEEN EU ECONOMIC FREEDOMS AND FUNDAMENTAL LABOUR RIGHTS

The *Viking* and *Laval* story⁴ is taken from the battlefield of normative patterns as Christensen described them. Internal market freedoms representing the Market-Functional pattern are in conflict with the social dimension, especially as regards the maintenance of established positions achieved by the trade union movement when it comes to control of the national labour market in a certain aspect of wage competition. These judgments have been heavily criticised, not only

³ Ibid.

⁴ See Case C-438/05 *International Transport Workers' Federation* [2007] ECR I-10779 ('*Viking*') and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 ('*Laval*'), and the 2008 decisions in Case C-346/06 *Rüffert* [2008] ECR I-1989 and Case C-319/06 *European Commission v Luxembourg* [2008] ECR I-4323.

by labour lawyers, but also generally in Sweden, as endangering the traditional Swedish model for the regulation of the labour market. The right-wing government therefore wanted to protect the Swedish trade unions' established positions as far as possible within the scope allowed by the case law of the Court of Justice of the European Union (CJEU). Consequently, the Swedish legislation *Lex Laval* was adopted as a response and a defence for the established position of Swedish trade unions.

Through *Lex Laval*, Sweden has attempted to link and integrate the granting of minimum protection for posted workers with the Swedish system of collective bargaining. In combination with the interpretation by the CJEU of the provisions in the Posting of Workers Directive, the requirement in the Directive⁵ for equal treatment of employers has made it rather complicated to achieve this integration.⁶

The first problem in this context is that the formulation of the requirement that employers must be treated equally seems to be in contradiction with the explicit acceptance in the Directive to use the wage levels in collective agreements (which do not have an *erga omnes* effect) as the basis for setting a minimum standard, especially on wages.

The Directive (Article 3(8)) explicitly prescribes that in the absence of a system for declaring collective agreements to be of universal application or having an *erga omnes* effect, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards that are generally applicable to all similar undertakings in the geographical area, and in the profession or industry concerned; and/or
- collective agreements concluded by the most representative employers and labour organisations at national level, as applied throughout the national territory.

The Swedish *Lex Laval* is based on the first of these two. The problem with both of these situations, however, is that by definition there is no legally binding general application of the agreement (and this is the starting point for the need for these two paragraphs), nor can there be 100 per cent coverage of the collective agreement. There may well be some employers at national level who, for various reasons, fall outside the scope of the application of these general agreements.

The preparatory works for the *Lex Laval* quite rightly underline that this conflict cannot mean that the principle of equal treatment must be given such a strict interpretation as to make the use of the two alternatives in Article 3(8)

⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

⁶ The following analysis of the *Lex Laval* draws heavily on the reasoning in N Bruun and J Malmberg, 'Lex Laval: Collective Actions and Posted Work in Sweden' in R Blainpain and F Hendrickx (eds), *Labour Law Between Change and Tradition: Liber Amicorum Antoine Jacobs* (Dordrecht, Kluwer, 2011).

impossible.⁷ The reasonable interpretation put forward in the Swedish *travaux préparatoires* is that the principle of equal treatment must be understood to mean that these applicable collective agreements and their terms on minimum wages must be applied to and enforced in the same manner for both foreign and Swedish service providers.

The Swedish interpretation, therefore, makes a distinction between the requirements or conditions on which an existing collective agreement can be given the normative effect of indicating a mandatory minimum standard and the criteria for equal treatment. Only a national branch-level collective agreement can qualify for setting such a standard, and in the absence of such an agreement, no minimum wage is to be found. In accordance with this, the requirement on equal treatment does not imply that all employers at national level must be bound by the agreement, but only that the terms and conditions in the agreement are equally applied and enforced for all national and foreign employers.⁸

By opening up the possibility for Swedish trade unions to demand to enter a collective agreement with the foreign service provider in order to grant posted workers minimum protection, *Lex Laval* links the posting situation to the Swedish model for collective bargaining. By restricting the demands that Swedish trade unions can make on the foreign employer, in accordance with the *Laval* ruling, the legislation clearly restricts the freedom of association or collective bargaining rights of the Swedish trade unions: they cannot demand more favourable terms and conditions than the minimum standard prescribed in Article 3(1) of the Posting of Workers Directive;⁹ they cannot make demands concerning any other matter than that explicitly regulated in Article 3(1); and they cannot demand any collective agreement at all if the posted workers already enjoy terms and conditions that essentially are at least as favourable as those that apply in accordance with Swedish law and the applicable general collective agreement.

The consequence of these restrictions is that the legislator has introduced specific and strong protection for transnational service providers as employers. This protection does not apply to national employers. Trade unions can still demand more favourable collective agreements (compared to the minimum standard in the Directive) as regards both the scope of terms and conditions, and the level of protection against national employers not bound by the agreement. Those bound by the nationwide agreement must also apply a wide range of terms and conditions regarding issues outside the scope of the hard nucleus. The requirement

⁷ This interpretation is also supported by the *Laval* judgment, above n 4, where the CJEU indicates that Sweden has not made use of the possibilities offered by Art 3(8) (see paras 62–72). This reasoning would be meaningless if the criteria for using Art 3(8) are interpreted in such a manner that Sweden does not qualify.

⁸ See Government Bill Proposal 2009/10:48, 31.

⁹ The CJEU explicitly underlined that the provisions included in the trade union's demand for a collective agreement in the *Laval* case went beyond what the transnational service provider was required to observe in terms of mandatory rules for minimum protection in accordance with the Directive. See *Laval*, above n 4, para 108 and paras 81 and 83, referred to in para 108.

for equal treatment of employers has been turned upside down: we find here a situation of so-called *reverse discrimination*, to the disadvantage of national Swedish companies (and Swedish employers' associations) that compete with foreign service providers.

The only case in which it can be argued (at least theoretically) that Swedish employers are in a better position than a foreign service provider, is in the fact that a Swedish collective agreement made at a lower level than the minimum defined by the hard nucleus will bring about an obligation to settle, while a foreign collective agreement that does not fulfil the minimum criteria can be set aside by trade unions that resort to collective action.

The new legislation restricts some of the fundamental principles of free collective bargaining and freedom of association, as has been applied in the Nordic countries, but also as interpreted by international bodies protecting fundamental rights in the field of collective labour law, especially ILO Conventions 87 and 98.¹⁰ The problems relate to several elements concerning free collective bargaining: demands are usually to be decided by the trade union, and not set by law. In particular, restrictions on the material scope of what trade unions can demand are very difficult to justify in the light of ILO Conventions 87 and 98. Furthermore, the outcome of the bargaining process and possible collective action should not be defined beforehand. The new Swedish legislation introduces all these elements and restricts wage competition at the transnational level.

III. GENERAL DEVELOPMENTS IN EUROPEAN AND EU LABOUR LAW

The development regarding transnational labour law also has its counterpart in national labour law. Here we can see a gradual transformation of collective bargaining at branch level in the whole of Europe.¹¹ In this context, I will not document the development in detail, but my argument is that a transformation has gradually taken place, with the end result being that wages are no longer settled through branch-level collective bargaining, but increasingly through company-level collective bargaining, and also by minimum wage legislation.

The old principle that branch-level collective bargaining sets a general minimum wage level that cannot be undermined by companies is no longer a valid description of the general situation. In the old post-war days, this branch-level minimum was seen as the great achievement that forced companies to compete in

¹⁰ The ILO Freedom of Association Committee (CFA) has interpreted ILO Conventions 87 and 98 very strictly when it comes to allowing different types of restrictions on the principle of free and voluntary bargaining that the legislator and the authorities might create. See ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edn (Geneva, 2006).

¹¹ See D Vaughan-Whitehead (ed), *Work Inequalities in the Crises: Evidence from Europe* (Geneva, ILO, 2011) (reports on separate countries).

productivity, and not in low wages.¹² In present-day Europe, even the economically strong Member States such as Germany and Austria have introduced concession bargaining that makes it possible to agree on standards below the branch minimum at local level. In countries where the principle of the minimum is still upheld, the practical implications of this principle are significantly limited by the far-reaching possibilities for introducing local deviations—but only when the parties have agreed on such measures. From Christensen's point of view, this development indicates a strong shift towards the Market-Functional pattern, and both the normative patterns of Protection of Established Position and Just Distribution are undermined.

Christensen was a sharp observer of this development in labour law. She emphasised that labour law had become a kind of organisational principle for Swedish society—everyone should be a paid employee, in Swedish a '*lönearbetare*'. The result of this was a generalisation of labour law, which was constructed around the existence of the employment relationship: a weaker party who deserved protection by legislation and trade unions. This trend towards a general labour law, from a more specific and narrower version, is a general trend all over Europe, but has been exceptionally strong in the Nordic countries. In fact, this trend is still ongoing, for example in Finland, where in 2010 university professors and other staff were transformed from public servants into employees under the Employment Contracts Act, in the context of a change in the legal position of the universities.¹³ This trend towards an all-encompassing labour law has been clear, although a certain fragmentation within labour law has also occurred: the groups of fixed-term employees, part-timers and employees working for temporary agencies and on contract have, for instance, been growing.

The starting point and logic for this development in labour law has been the need to protect the employee, and the rules have been adapted also to accommodate the needs of employers in a dynamic and changing business environment.

It is interesting to contrast this development within national labour law in most European states against the development currently taking place in EU law.

Within the European Union, the starting point for the economic constitution was a general broad concept of the worker or employee who was entitled to move around freely in the entire internal market. This concept has been interpreted rather broadly and has been considered as being in line with the national perception in most Member States of who is regarded as a worker.

The evolution of EU law has gradually led to a radical fragmentation of the category of employees. Within the regime of the posting of workers, the CJEU has succeeded in creating a category of workers not deemed to be on the labour market of the country in which they perform their work. Instead, these workers are simply regarded as a kind of institutional link to the service providers taking

¹² This was the central content of the old Rehn-Meidner doctrine in Sweden.

¹³ See N Bruun, 'Universitetsstyrning och autonomi i ett Corporate Governance-perspektiv' in *Festskrift till Boel Flodgren* (Lund, Juristförlaget i Lund, 2011) 32.

advantage of the right to freely provide services across borders. The position of these employees is not determined by their need for social protection; rather, the decisive factor is their position on the internal market. Again, this approach has been difficult to fully uphold regarding temporary agency workers, who actually can move across borders and are employed by service providers. This dilemma has been tackled by a specific Directive on temporary agency work,¹⁴ creating some problems for Member States in upholding normative coherence between different forms of exploiting labour.¹⁵

The position of employees on the internal market can also be dependent on their citizenship and country of origin. There are illegal workers (third-country nationals) who are in very weak positions, and there are third-country nationals who are long-term residents, and who can even be regarded as EU citizens. This again gives them a fairly strong position as employees on the internal market.

In 2005, a specific Directive was adopted concerning working conditions for third-country nationals in the field of scientific research.¹⁶ In 2011, a Directive was adopted regarding a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State, and on a common set of rights for third-country workers residing legally in a Member State.¹⁷

So, for some time now, we have had pending proposals for Directives on:

- highly qualified workers;¹⁸
- seasonal workers;¹⁹
- intra-corporate transferees.²⁰

The common feature of all this adopted and pending 'labour law regulation' of different groups of workers is the starting point that these employees perform some kind of useful function from an economic point of view. The primary aim is not to protect them, but to create a legal form in which employers who need to do so can recruit employees, and where these employees can gain access to the EU labour market. In an ongoing study, Petra Herzfeld Olsson has shown just how inconsistent these regulations are from a traditional labour law point of view.²¹

¹⁴ Directive 2008/104/EC [2008] OJ L327.

¹⁵ See K Ahlberg *et al*, *Transnational Labour Regulation: a Case Study of Temporary Agency Work* (Brussels, PIE Peter Lang, 2008).

¹⁶ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L289.

¹⁷ Directive 2011/98/EU of 13 December 2011 [2011] OJ L343.

¹⁸ This Directive was adopted in 2009: Council Directive 2009/50/EC of May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155.

¹⁹ COM(2010)379.

²⁰ COM(2010)378.

²¹ See P Herzfeld Olsson, *Giving to Those Who Have and Taking from Those Who Have Not: the Development of an EU Policy on Workers from Third Countries*, Formula Working Paper 34 (2012).

From a normative pattern of labour law, these regulations lack all coherence and the principle of equal treatment is applied differently in different instruments.

From Christensen's perspective, these developments can perhaps be seen as an illustration of how the Market-Functional pattern takes over labour law normative patterns such as Just Distribution. To some extent, the pattern of Protection of the Established Position applies, since those with the strongest position on the labour market are also given the strongest protection by the law. However, the main problem here is the normative incoherence that national labour law faces and will continue to face as a result of these new approaches. One can foresee a clash between national labour law and European instruments during the years to come, as a result of the fact that the regulatory patterns the European Union introduces are based on a different regulatory approach than traditional national labour law.

IV. ECONOMIC CONSTITUTION OF THE EUROPEAN UNION AND THE ECONOMIC AND FINANCIAL CRISIS

A. Background

The current developments in European labour law cannot be adequately described without examining the economic governance of the economic crisis and its impact on labour and social law, especially in those countries that have been forced to seek economic assistance from the European Union.

The background for the crisis is well known. In the aftermath of the global 2008 financial crisis, the situation in Greece (which has long had a weak public economy with severe structural problems) reached a state of alarm in April 2010. Potential Greek bankruptcy was a matter for serious concern, especially for the European Union's Euro Group, to which Greece belongs. This situation prompted the Group to fulfil the promise they had given at the European Council meeting: to take necessary determined and coordinated action as required to safeguard the financial stability of the euro.²²

As a result, negotiations were started between the Greek government, on the one hand, and a group consisting of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), on the other. Within a few weeks, a complicated contractual and legal structure was devised: one key document is the detailed Memorandum of Understanding (MoU), signed by Greece and by the European Commission on behalf of the Member States belonging to the Euro Group.²³ Other agreements are the Intercreditor Agreement, and a Loan Facility Agreement that settles the availability of credits

²² See European Council, Conclusions (25 March 2010), available at ww.consilium.europa.eu.

²³ The MoU comprises a Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding; available at www.imf.org/external/pubs/ft/scr/2010/cr10111.pdf.

in the form of pooled bilateral loans for Greece, as well as an agreement between Greece and the IMF in the form of an Exchange of Letters.²⁴ In the latter, the Greek government undertook to fully implement the agreed measures, including the MoU. These agreements have also been ratified separately by the Euro Group Member States.²⁵

On 10 May 2010, the Council took a decision on certain measures that Greece must undertake before the end of June 2010. Furthermore, the decision listed measures that had to be undertaken by the end of September 2010, or by the end of December 2010. The measures listed in the Council's decision were the same as those listed in the MoU.

The Greek bailout package was an alarm call for the European Commission, which in the first half of May 2010 had already made proposals for measures to preserve financial stability in Europe, consisting of a European Financial Stability Mechanism (EFSM) and a European Financial Stability Facility (EFSF). The EFSM was established by a Council Regulation on 11 May 2010.²⁶ The EFSF was established by an intergovernmental agreement (Framework Agreement) of the Euro Group Member States, in the form of a registered limited liability company under Luxembourg law. These Member States own shares in the company in proportion to their participation in the arrangement with guarantee commitments. Altogether, the commitments formed a total guarantee of 440 billion euros.

In September 2010, the government of Ireland revealed that the full cost of the January 2009 bailout to the Irish taxpayer was estimated at 50 billion euros, or about 32 per cent of Ireland's GDP. This sparked a crisis that led to a dialogue between Ireland, on the one hand, and the IMF and the European Union, on the other, similar to the one that had taken place concerning Greece.²⁷ A National Recovery Plan for 2011–14 was drawn up in cooperation with the IMF and the European Union. This plan was published on 24 November 2010 after a formal request from the Irish government for financial assistance from the European Union and the IMF on 21 November 2010. The Joint Commission-ECB-IMF mission team negotiated the conditions of the programme, and agreement at the technical level was reached on 28 November 2010 on a comprehensive policy package for the period 2010–13, supported by financing at a total of 85 billion euros.

On 11 March 2011, the Portuguese authorities requested financial assistance. The Euro Group and ECOFIN ministers invited the Commission, the ECB, the IMF and Portugal to set up a programme and take appropriate action to safeguard financial stability. At the same time, they issued a statement according to which, in the context of a joint EU/IMF programme, the financial assistance package to

²⁴ See A Antoniadis, 'Debt Crisis as a Global Emergency: the European Economic Constitution and other Greek Fables' (1 September 2010), available at <http://ssrn.com/abstract=1699082>.

²⁵ An exception was Slovakia, which refused to ratify the agreements.

²⁶ Council Regulation (EU) 407/2010 of 11 May 2010 [2010] OJ L118.

²⁷ As late as December 2009, the European Council had concluded that Irish authorities had taken effective action to correct the excessive deficit and had moved the deadline for correcting it to 2014.

Portugal would be financed on the European side within the framework provided by the EFSM and the EFSF.²⁸ It was furthermore stated that the euro zone and EU financial support will be provided on the basis of a policy programme that will be supported by strict conditionality and be negotiated with the Portuguese authorities.²⁹ Both Spain and Italy have subsequently been forced to adopt strong economic programmes.

B. Reform Programme

The European Commission reacted without delay to the Greek crisis also at a general level of norm setting. As early as 8 May 2010, the Commission announced that it would present to the Council a concrete proposal for a European Stabilisation Mechanism to preserve financial stability in Europe, as indicated above. On 12 May, the European Commission issued a Communication entitled 'Reinforcing economic policy coordination'.³⁰ Here, we find already the main elements in the reform programme that have subsequently been further elaborated on.

On the same day, 12 May 2010, the Council also adopted a Regulation establishing a European financial stabilisation mechanism.³¹ Following a general discussion in the European Council in June, the Commission issued a new Communication.³² This document contained an annex with a roadmap, where seven concrete legislative proposals were envisaged during the period September 2010 to January 2011.

The European Commission followed the roadmap quite closely, and presented a number of proposals³³ aimed at increased and improved control of economic

²⁸ Statement on 8 April 2011, Memo 11/227.

²⁹ In accordance with the statement, the programme will be based on three pillars: (1) ambitious fiscal adjustment to restore fiscal sustainability; (2) growth and competitiveness-enhancing reforms designed to remove rigidities in the product and labour markets, and encourage entrepreneurship and innovation, allowing for sustainable and balanced growth and the mitigation of internal and external macro-economic imbalances, while safeguarding the economic and social position of its citizens; this should include an ambitious privatisation programme; and (3) measures to maintain the liquidity and solvency of the financial sector.

³⁰ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions, 'Reinforcing economic policy coordination', COM(2010)250 final (Brussels, 12 May 2010).

³¹ Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1–4.

³² Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions, 'Enhancing economic policy coordination for stability, growth and jobs: tools for stronger EU economic governance', COM(2010)367 final (Brussels, 30 June 2010).

³³ (1) Proposal for a Regulation of the European Parliament and of the Council on the prevention and correction of macro-economic imbalances, COM(2010)527 final; (2) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, COM(2010)526 final; (3) Proposal for a Regulation of the European Parliament and of the Council on enforcement measures to correct excessive macro-economic imbalances in the

governance within the European Union. In general terms, these proposals can be divided into three types of instruments. The first instrument attempts to introduce new procedures for national economic policy and budgetary prudence, and to also strengthen surveillance. Here also, sanctions can be introduced against a state that does not follow economic policy recommendations from the Council, and the Member State in question may be deemed liable to fines that may amount to 0.2 per cent of its GDP. The second type of instrument has its focus on the prevention and correction of so-called macro-economic imbalances, and also on the enforcement mechanism to correct them. Here, the Commission also proposes that economic sanctions can be introduced at up to 0.1 per cent of the GDP of a Member State.³⁴ The third type of instrument attempts to harmonise and coordinate national budgetary structures and content, in order to increase transparency and possibilities, among other things, to compare accounting systems and perform statistical reporting.

These proposals have now been adopted as amended, especially by the European Parliament. At the same time, preparations for the introduction of a permanent European Stability Mechanism (ESM) have been initiated, mostly in the form of a codification of current practice, and the guiding political decisions were taken at the European Council meeting in March 2011.

C. Social Policy Implications

I am not, in this context, interested in a detailed study of the mechanisms of the stability instruments of the European Union, but wish to study their impact on social policy in the Member States experiencing economic difficulties, and also how these measures fit into the Lisbon Treaty's description (Article 4 TEU) of the European Union as a social market economy and other Treaty Articles regarding the European Union and its relationship to its Member States.

If we briefly map the measures undertaken in Greece and Ireland, we can note the following: in Greece, the report from the Prime Minister and the Governor of the Bank of Greece gives a picture of what had taken place from the period of the Spring of 2010 up until 6 August 2010.³⁵ The government reports that the fiscal programme is making good progress, but makes no mention of reactions to the measures undertaken: massive nationwide and per-sector collective action

euro area, COM(2010)525 final; (4) Proposal for a Regulation of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area, COM(2010)524 final; (5) Proposal for a Council Directive on requirements for the budgetary frameworks of the Member States, COM(2010)523 final; (6) Proposal for a Council Regulation (EU) amending Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, COM(2010)522 final.

³⁴ See COM(2010)525 final.

³⁵ Greece, Memorandum of Economic and Financial Politics, Athens, 6 August 2010, available at www.imf.org/external/pubs/ft/scr/2010.

during the period, as well as mass demonstrations and street protests. In the report, significant reductions are reported in health care and public administration, which will lead to a significant reduction in employment. From the point of social policy, the most contested reforms were related to pensions and the labour market. For these sectors the following reports were given.

Parliament approved a substantial pension reform ahead of schedule. This introduces a new system consisting of a contributory pension for topping up a non-contributory, means-tested, basic pension, and aiming to control the increase in pension spending. These assessments will determine whether further adjustments to pension system parameters will be required, to contain the increase in pension spending to 2.5 ppts of GDP in the period 2009–60. Any further adjustments required will be completed by the end of June 2011, in consultation with pension experts, as foreseen in Law 3863.

Labour market reform is almost completed. Substantial legislative changes were introduced in July, with relaxations on employment protection legislation and collective dismissals, reforming minimum wages, reducing overtime premia, and allowing company-level agreements to take precedence over other levels. Alongside reforms in public employment to reduce labour market distortions, these measures will increase the adjustment capacity of businesses, ultimately boosting employment. Further measures will be taken to reform collective bargaining, including the elimination of the automatic extension of per-sector agreements to those not represented in the negotiations. Finally, the government will adopt legislation to introduce symmetry in the arbitration system, while strengthening its independence and transparency.

The Greek trade unions complained to the ILO concerning the policy in Greece.³⁶ In its 2011 Annual Report,³⁷ the CEACR (Report of the Committee of Experts on the Application of Conventions and Recommendations) reiterated its established positions on the relationship between economic crisis, public interference in collective bargaining, and ILO Convention 98 on collective bargaining,

³⁶ The critical voices from the trade union side described the situation quite dramatically: ‘The GSEE concludes that Acts Nos 3833/2010, 3845/2010 and 3863/2010 lead to workers’ disempowerment in the face of the combined spill-over effect of lay-offs, wage freezes and the abolition of the minimum standards of wages, negate the State’s fundamental obligation to provide and protect decent work, violate the very essence of individual and social rights, and endanger social peace and cohesion. The GSEE emphasises that the measures in question are permanent and irreversible, notwithstanding the specific time frame and limited duration of the loan mechanism; are disproportionate, socially unjust and discriminatory vis-à-vis workers, especially the most vulnerable; have been adopted without examining sufficiently other well-weighed and more appropriate alternatives; are not quantifiable and their scope has no perceivable causal relationship with the pursued aim of implementing the stability programme; are not accompanied by adequate and concrete safeguards to protect the living standard of workers and support vulnerable groups in addressing the combined effect of economic austerity measures and the economic crisis; have had a serious and direct impact in weakening the position of GSEE during the collective negotiations that began in January 2010 for the conclusion of the new national general collective agreement’. See Report III (1A) 84, available at www.ilo.org/global/standards/WCMS_151490/lang--en/index.htm.

³⁷ See *ibid.*

on the occasion of its preliminary comments on Greece in the framework of the mechanism to support the Greek economy with the involvement of the IMF and European Union:

The CEACR emphasised the importance of holding full and frank consultations with the employers' and workers' organisations on the revision of collective bargaining machinery, in accordance with the principle of the autonomy of the parties to the collective bargaining process, and in light of the long-ranging implications of such revision for the standard of living of workers. Furthermore, it considers that as a general matter, if, as part of its stabilisation policy a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should only be imposed as an exceptional measure and only to the extent necessary, without exceeding a reasonable period, and should be accompanied by adequate safeguards to protect workers' living standards.³⁸

The principle of the autonomy of the parties to the collective bargaining process, as well as the right to collective bargaining, are both enshrined in Convention 98. During an economic crisis, the Freedom of Association Committee (CFA) has further specified the principle:

In cases of government intervention to restrict collective bargaining, the CFA has considered that it is not its role to express a view on the soundness of the economic arguments used by the Government to justify its position or on the measures it has adopted. However, it is for the CFA to express its views on whether, in taking such action, the Government has gone beyond what the CFA considers acceptable restrictions that may be temporarily imposed on free collective bargaining.

While the CFA appreciates that the introduction of wage restraint measures must be timed in order to obtain the maximum impact on the economic situation, it nevertheless considers that the interruption of already negotiated contracts is not in conformity with the principles of free collective bargaining; as such contracts should be respected.

If, as part of its stabilisation policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure, and only to the extent necessary and without exceeding a reasonable period, and should be accompanied by adequate safeguards to protect workers' living standards.

A three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilisation constitutes a substantial restriction.

In any case, any limitation on collective bargaining on the part of the authorities should be preceded by consultations with workers' and employers' organisations, in an effort to obtain their agreement.³⁹

³⁸ See *ibid* 83.

³⁹ *Digest of Decisions and Principles of CFA* (2006) paras 992–1045, available at www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_090632/lang--en/index.htm.

The Committee concluded that it should be highlighted that all 27 EU Member States have ratified Convention 98 on the promotion of collective bargaining and Convention 87 on freedom of association. These are part of the eight core labour standards Conventions. Over 90 per cent of all 183 ILO member states have ratified these Conventions. Conventions 87 and 98 have also strongly influenced other regional fundamental rights instruments, such as the European Social Charter, the European Convention on Human Rights (freedom of association is included here) and the EU Charter on Fundamental Rights.

These strong conclusions by ILO seem clearly to indicate that the Greek bailout has not conformed to ILO standards. From the government positions above, we can also see that there are concerted efforts to change the structural features of the Greek industrial relations system in the context of crisis management.

In September 2011, the ILO sent a high-level Mission of Inquiry to Greece. Its extensive report is publicly available.⁴⁰ In the Spring of 2012, the Committee of Experts in their report dealt extensively with Greece, and again serious violations of the principle of freedom of association were discovered. In fact, it seems that the entire institutional labour market system of Greece is being destroyed as a consequence of the crisis, as public promotion of the national trade unions in the form of public funds has also been withdrawn.

In Ireland, the crisis has had a series of negative impacts on the labour market. Apart from the general increase in unemployment and emigration, cutbacks in public services (especially in health care), increased taxes, the introduction of new forms of taxes affecting the lowest paid, increase in prices (especially of food prices) and the serious mortgage debts incurred by families are some of the measures and events related to the labour market we can mention. The Minister for Finance used 'emergency' legislation to:

- cut public servants' pay and pensions;
- restrict collective bargaining for certain categories of workers;
- cut minimum wages (ignoring the established minimum wage-setting mechanism) by 1 euro per hour;
- reduce social welfare payments, including unemployment benefit, sickness benefits and maternity payments in both amounts and the duration of payment;
- remove tax relief for trade union subscriptions.

These drastic measures were undertaken by a government that lost office in the elections of early Spring 2011. There is now a new programme for government, and while this holds some prospects for improving the situation, the strong MoU is still in place. The new majority partner, Fine Gael Party, is reported not to be very supportive of labour and trade union rights. One of the main areas this

⁴⁰ See *Report on the High Level Mission to Greece, Athens, 19–23 September 2011*, available at www.ilo.org.

party has criticised is universally applicable collective agreements. Therefore, the outcome remains to be seen in this regard.

The conclusion is that what we are observing is an extremely strong impact on social policy and social policy legislation caused by the bailout mechanism. Formally speaking, the final decisions in both Greece and Ireland were in the hands of the Parliaments of these states, but the content of the MoUs were clearly a result of negotiations, or even of negotiations ‘in the shadow of bankruptcy’, in which the borderline between negotiations and dictates becomes very blurred. In Spain and Italy, the same types of measures are being introduced, partly on a voluntary national basis, and partly under pressure from international financial institutions and the European Union.

The timeframe and procedures for reducing costs do not respect established national or international requirements for making changes (eg mutually agreed wage agreements or pension schemes). It is of interest to investigate how this new economic policy and constitutional practice fit into the framework of the Lisbon Treaty, especially whether this governance and practice are in conformity with the requirements of a social market economy (Article 4 TEU), but this discussion cannot take place here.

V. BACK TO CHRISTENSEN AND THE THEORY OF LAW AS NORMATIVE PATTERNS IN A NORMATIVE FIELD

The legal developments sketched above do not easily fit into the theory introduced by Christensen. The problem seems to be that Christensen’s theory uses the perspective of legal evolution within the normative field, which she describes as working life and labour law.

The problem with the disruptive features the development of the European Union represents is that it does not actually—as a starting point—accept the basic international standard for modern labour law: ‘Labour is not a commodity’. On the contrary, it might be argued that the starting point here is that labour is a market commodity on the internal market and that wage competition is a relevant and even necessary factor for gaining competitive advantages for Member States. All restrictions in this regard seem to be viewed as being incompatible with the economic constitution of the European Union. The consequence of this is a clash between the EU Charter of Fundamental Rights and international labour standards, on the one hand, and EU law and governance, on the other.

From the point of view of Christensen’s theory, one could argue that we have moved on to an extreme Market-Functional pattern. Within this new pattern, however, questions of the implications of the normative patterns of Just Distribution and Protection of Established Position will still be relevant.

I argue here that Christensen’s theoretical thinking actually offers two plausible solutions when attempting to apply her theory to the current development. The first solution would argue that the normative field, so well described by

Christensen, can exist only if there is some basic acknowledgement of the various poles or cornerstones. The new disruptive EU practice does not seem to recognise any Protection for Established Positions within the social dimension, and thus the present development actually goes beyond Christensen's theory of normative development—which is perhaps better suited to describing legal evolution in a local or nation-state context. However, there is another alternative that I think Christensen herself would have favoured, and which she actually hinted at when she stated that normative patterns can move between different social spheres.⁴¹ In actuality, the present development is shifting the borders between different normative fields. What is happening is that the borders between the fields of labour law and social (security) law are being blurred. We actually get a new kind of pole or normative pattern in the labour law field, a pole that could be termed Basic Subsistence.⁴² When the traditional tools for protecting established positions are seriously undermined, the legislator must still ensure that workers can survive. Suddenly, schemes for minimum wage legislation become necessary, in order to compensate for the lack of collective bargaining, and the debate will centre on how to decide on a proper minimum wage level, in order to place at least some restrictions on the 'race to the bottom' in wage competition.

⁴¹ See Christensen, 'Normative Patterns and the Normative Field', above n 2, 16.

⁴² The term was used by Anna Christensen in her article, *ibid*, in 1999.